United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

BRIEF FOR APPELLANT

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

637

No. 22,305

UNITED STATES OF AMERICA,

Appellee,

v.

LEROY M. RUSSELL,

Appellant.

APPEAL FROM THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF COLUMBIA

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April 15, 1969

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ISSUES PRESENTED*

I.

Where an unnecessary on-the-scene confrontation between an accused and a seriously injured victim of a brutal assault is held in the absence of counsel, and in a manner unnecessarily suggestive and conducive to misidentification, is testimony regarding that identification, or a courtroom identification not shown to be of an independent origin, properly admissible into evidence?

II.

Where the government's case is based essentially on the identification testimony of the complainant, where the identification was made during a suggestive pre-trial confrontation between the complainant and the accused alone in the absence of counsel, and where the only other individual who might have identified (or exonerated) the accused is peculiarly available to the government, but not presented at trial, is the defendant entitled to a "missing witness" instruction to the jury?

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* This is an original appeal. Rule 8(d), General Rules, United States Court of Appeals for the District of Columbia Circuit.

CONSTITUTIONAL PROVISIONS

Fifth Amendment:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Sixth Amendment:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 22,305

UNITED STATES OF AMERICA,

Appellee,

v.

LEROY M. RUSSELL,

Appellant.

APPEAL FROM THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF COLUMBIA

BRIEF FOR APPELLANT

JURISDICTIONAL STATEMENT

On July 12, 1968, in the United States District Court for the District of Columbia, appellant, Leroy M. Russell, was convicted of assault with intent to commit robbery. Notice of appeal from the final decision was filed in a timely manner, and on July 29, 1968, the District Court granted appellant's application to prosecute his appeal without prepayment of costs. The jurisdiction of this Court is properly invoked pursuant to the rules of this Court, and to 28 U.S.C. §1291.

STATEMENT OF THE CASE

Procedural Background

In the early morning hours of November 19, 1967, William M. McIndoe was assaulted by two men in front of his apartment building at 1630 Park Road, N. W., Washington, D. C. On January 22, 1968, a duly sworn Grand Jury returned a two-count indictment against appellant in connection with the events of November 19, 1967. The first count charged robbery (22 D.C. Code §2901); the second count charged assault with a dangerous weapon (22 D.C. Code §502). Appellant was arraigned on February 2, 1968, and pleaded not guilty to both counts.

Prior to the trial, counsel for appellant moved for suppression of any identification testimony, under United States v. Wade, 388 U.S. 218 (1967), and Stovall v. Denno, 388 U.S. 293 (1967). Oral argument on that motion, as well as on a motion to suppress testimony concerning a knife alleged to have been taken from appellant at the time of arrest, was held May 16, 1968, before United States District Court Judge Joseph C. Waddy. Both motions were denied. (M. Tr. 56, 57.)[1/]

The trial proceedings were conducted May 20-21, 1968. Defense motions for acquittal at the conclusion of the government's case, and again after the case for the defense, were denied. (Tr. 169, 245.) On

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1/ A transcript of the motions proceeding was filed in this Court March 27, 1969, as a supplemental record. References to that transcript will appear: "M. Tr. ___." References to the trial transcript will appear: "Tr. __."

May 22, 1968, the jury, after approximately five hours of deliberation, found appellant guilty, under the first count, of the lesser offense of assault with intent to commit robbery. The jury found appellant not guilty under the second count. On July 12, 1968, appellant was sentenced to three to nine years imprisonment. Notice of appeal was filed in a timely manner.

The Relevant Facts

At approximately 3:45 a.m. on November 19, 1967, the complainant, William F. McIndoe, was approaching the entrance to the apartment building in which he resided at 1630 Park Road, N. W., Washington, D. C. (M. Tr. 43-44; Tr. 20, 59.) As he neared the entrance, he was attacked from the rear by two men, one tall and one short. The taller man put his right arm around the complainant's throat and jerked him backwards, while the shorter assailant tripped him. The complainant was then dragged backwards away from the building towards the street, into the gutter between two parked cars. (M. Tr. 42; Tr. 21, 31-32.) While the tall assailant maintained his grip around the complainant's throat from behind, the shorter assailant struck the complainant repeatedly with his fists, both in the body and in the head. The complainant struggled to free himself, and during the course of the encounter, the complainant and the tall assailant fell to the ground in the gutter, the tall assailant beneath the complainant, maintaining his grip around the complainant's throat. The shorter assailant, now above the complainant, continued to pummel him with fists and feet. The assault was lengthy and violent, the parties rolling about in the gutter. (M. Tr.

42-43; Tr. 21-22, 32, 35-36, 37.)

During the course of the struggle, the complainant saw the flash of a knife over his head, "and they cut me in my mouth and the blood poured out all over my coat and over my face." (Tr. 22-23.) The complainant believed the tall assailant wielded the knife, "because the other [short] one was in front of me all that time and he was throwing his fists." (Tr. 22.)

Throughout the struggle, and from its inception, the tall assailant remained behind the complainant, while the short one was in front of him. (M. Tr. 44, 45; Tr. 32.) The complainant observed the face, the build and the clothing of the short assailant. (Tr. 33.)

After the assailants had searched the complainant,[2/] the short one said "Let's go" (Tr. 23, 36, 39) or "hurry it up" (Tr. 134) and started to run away from the complainant. (M. Tr. 44; Tr. 23, 39.) As the taller assailant released the complainant to follow, the complainant still on the ground, twisted around and tried to grab him. At that point, the complainant testified, he saw his assailant's face. (Tr. 38, 28, 35, 39, 40-41; M. Tr. 44.) The tall assailant broke away and followed the shorter one. (Tr. 23.) The complainant described the lighting conditions at the time of the assault as "very good, excellent" (Tr. 27), and stated that he had a "very good" opportunity to see the faces of the two assailants (Tr. 27-28).

2/ The complainant testified initially that during the assault the tall assailant "put his left hand in my pocket," that the short one took "a wallet out of my left rear pocket," and that "$15.00 or something [was taken] out of my coat pocket." (Tr. 23, 24.) On redirect, he testified that he first observed that his property was missing hours later, after [illegible] (Tr. 73.)

The complainant testified that he saw both of the assailants running toward the entrance of an adjacent apartment building at 1610 Park Road, at which point he began looking for the police. (Tr. 24, 48-49, 53-54, 71.) Another government witness, Henry B. Klendena, who observed the last part of the struggle from a third floor window in the 1610 Park Road building (Tr. 132-34), testified he saw one of the assailants (the complainant's "short one") head for the main entrance of 1610, look back to where the second assailant (the complainant's "tall one") was still wrestling with the complainant "and hollered back and said: 'Hurry it up', he said: 'Hurry it up.'" (Tr. 134.) Klendena then testified as follows:

> He [the "short one"] came on towards the building I live in and walked in the building, walked in the building and the other fellow followed him in the building.
>
> Shortly after the second man [the "tall one"] went into the building, the first man came out and went, walked down the street towards 16th Street.

(Tr. 134; emphasis added. See Tr. 138.) Mr. Klendena described "the first man" as tall and slender. (Tr. 139.) He never saw the face of either of the assailants. (Tr. 137.)

The complainant testified variously that it was "approximately five or ten minutes" (Tr. 25; M. Tr. 38), "about ten or fifteen minutes" (M. Tr. 39), "about four or five minutes" (M. Tr. 39) between the time the assailants had run away and the police arrived.

At approximately that time, Metropolitan Police Officers Gaskins and Matson were cruising in a police scout car. (Tr. 88.) Officer Gaskins,

who was driving, testified that they were traveling south on 16th Street,[3] made a right turn (west) onto Park Road (Tr. 95, 105-06), and began driving along the south side of that one-way street at a speed of 15 to 20 miles an hour.[4] (Tr. 90, 106; M. Tr. 35.) Officer Gaskins recalled having passed a Negro man with a brown coat and light pants, walking east on Park Road. (Tr. 89, 90, 107; M. Tr. 4-5, 20-21.) He first observed the man when he was about 10 to 15 feet from the scout car. (Tr. 107; M. Tr. 34-35.) There was nothing unusual which drew the officer's attention to the man.(Tr. 108.) Officer Matson did not see the man. Officer Gaskins testified that at the time, the person he observed was 50 to 75 yards from the point where the officers encountered the complainant. (M. Tr. 5, 37; Tr. 121.)[5]

At the time the officers first saw the complainant, he was "stumbling there between parked cars." (Tr. 88.) As Officer Matson testified, ". . . this fellow staggered out between two parked vehicles. He had blood on his face and he fell on his hands and knees." (Tr. 172.) In Officer Gaskins' words:

> Well, first,at first my partner and I thought it was somebody playing, at first, because he was coming from between the cars and getting up and falling down on his knees and then getting back up again.

3/ Officer Matson testified that they had turned onto Park Road at 14th Street. (Tr. 172.)

4/ 22 to 29 feet per second. See Tr. 170-172.

5/ Officer Gaskins also testified that it was not until 3 or 4 minutes later that he came across the complainant. (M. Tr. 5.)

(Tr. 121.) The complainant had difficulty recalling where he first saw the police car (Tr. 55-58); "I saw a police car and that's all I remember." (Tr. 56.)

After seeing the complainant, the officers stopped the car, got out, and approached him. (Tr. 122, 173) Officer Gaskins described the complainant's condition at the time as follows:

> First he kept mumbling and then, you know, we could hear, "I have been robbed, I have been robbed." . . . [M. Tr. 11.]
>
> . . . at first we couldn't hardly get anything out of him. . . [M. Tr. 10.]
>
> He had blood coming from his mouth. Blood coming from his mouth and he had bloodstains on his clothes, blood on his clothes. [M. Tr. 4; see Tr. 88.]

The complainant testified that at the time, he had been cut in the mouth with a knife and had blood all over his coat and face (Tr. 22), that he had two broken ribs (Tr. 26), and that his knees were "all banged up" (Tr. 39). He stated that his head, chest and foot were "hurting" (Tr. 26; M. Tr. 38), that he had headaches (M. Tr. 41) and that he was sick (Tr. 26). "It is like you've been hit with a sledge hammer and you don't think of time." (Tr. 30.)

Officer Gaskins asked the complainant what had happened. (Tr. 11.) The complainant testified that he told the officers he had been robbed, and that he had given the officers a description of both of the assailants. (M. Tr. 39; Tr. 33-34.) He stated that he had described the one as "short, heavy

built," having an overcoat on, and "dark, dark-skinned." (Tr. 33; M. Tr. 45.) He could not recall whether he had described the color or shade of the overcoat or pants of the short one. (Tr. 34.) The complainant stated he had described the second assailant to the police as "medium skinned and had on a half-brown, half-brown coat and light pants and he was tall." (M. Tr. 40; Tr. 34) He stated that he had told the police that the tall assailant had on a "short brown coat" (Tr. 68-69), and that prior to the police bringing the appellant back for identification, he had given the police "a complete description" of the tall assailant's clothes. (Tr. 77-78; compare M. Tr. 51.) His description of the assailants was stated to have been given to both Officer Gaskins and Officer Matson, at the same time. (M. Tr. 45-46; Tr. 187-88.)

Officer Gaskins, however, testified that the complainant had described only one of the assailants to him. (Tr. 123; M. Tr. 10-11.) The description was stated to have been one of a "Negro male", "having a brown coat and light pants."[6/] (Tr. 121-22, 88; see M. Tr. 4, 9-10, 13.) Officer Matson also testified that the complainant had described only one of the two assailants. (Tr. 173-74, 179-80.) His recollection of the extent of the complainant's description: "It was a colored fellow with a dark jacket on and light pants." (Tr. 174.)

6/ Compare M. Tr. 12: ". . .brown coat and yellow, light pants."

After learning from the complainant that the assailants had gone to 1610 Park Road, Officer Gaskins started running toward that building. (Tr. 88, 90, 123.) As he got to the front of the building, the officer testified, a Mr. Klendena shouted from a third floor window in the building, "'One of them just went that way,' and he said he had a brown coat and light pants." (M. Tr. 5-6.) Later, the officer testified that Mr. Klendena had said that "one of them just went around the corner." (M. Tr. 21.) 7/

Officer Gaskins proceeded to the corner of 16th Street and Park Road, where he saw appellant walking east across and past 16th Street. (Tr. 91, M. Tr. 6.) Appellant stopped and looked back, and "started walking back towards the north, which would be towards where [the officer] was." (M. Tr. 6; Tr. 109-10.) The officer then crossed 16th Street, met and stopped appellant. (M. Tr. 7, 22; Tr. 91-92, 216) At no time did the officer observe appellant running. (M. Tr. 22, 26; Tr. 229.). Appellant was neither out of breath (Tr. 229, 113) nor perspiring. (Tr. 230, 113.) Appellant did not have any blood on him. (Tr. 230,191; see Tr. 225.)

Officer Gaskins told appellant there was a report of a robbery in front of 1610 Park Road, and asked him if he would go back to 1610, because he fit the description given by the victim. (Tr. 93, 111; M. Tr. 7.)

7/ Mr. Klendena testified that he had "hollored down to the officer and told him that the man went down the street." (Tr. 135.) He could not tell whether or not the man he had seen had turned into the alley immediately adjacent to the 1610 building, because his lateral view of the street was obstructed. (Tr. 138.)

Appellant agreed, and he and the officer began walking toward the scene of the assault. (Tr. 93, 216.)

In the meantime, Officer Matson had entered the building at 1610 Park Road to investigate. (Tr. 180, 190.) Just inside the front entrance, to the right, was a desk and a night attendant. (Tr. 181.) The officer talked with the night attendant. (Tr. 181.) The appellant was never presented to the night attendant for identification. (Tr. 191.) The night attendant was not presented by the government as a witness. (See Tr. 250, 251-52.)

As Officer Gaskins and appellant were walking back toward 1610, and after having crossed 16th Street, the officer took hold of appellant's right arm. While appellant protested the officer's holding his arm, as they approached 1610, the officer tightened his grip on appellant's arm and grabbed appellant by the neck with his other hand. (Tr. 232, 96, 216-17; M. Tr. 7, 14-16.) At that point, a police patrol wagon arrived (M. Tr. 17) and the wagon crew, two uniformed police officers, were also now on the scene. (M. Tr. 18.) As Officer Gaskins and appellant reached 1610, and immediately prior to appellant's confronting the complainant, Mr. Klendena, from his third floor window "nodded his head and said that was the person." (M. Tr. 8.) The appellant was still being held by Officer Gaskins when he was presented to the complainant at the patrol wagon

"for identification, to be identified." (Tr. 64; M. Tr. 8, 17, 47.) "I was under the impression that they brought him back for me to identify him. . . ." (M. Tr. 48.)

The complainant described his condition at the time as follows:

> A. I was on my feet but I was hurting.
>
> Q. You were hurting, sir?
>
> A. My head and my chest -- in fact my chest was cracking on me, just to move my chest I would crack, and that was probably the broken ribs.
>
> Q. Were you bleeding at that time?
>
> A. In my mouth, yes. My overcoat was full of blood. [Tr. 64.]

> . . . I was hurting, you see, and I was beaten on my head and I had headaches, and I had broken ribs where they had pounded me. [M. Tr. 41.]

The complainant, who requires glasses, was not wearing them. (M. Tr. 46-47.)[8/] He was apparently assisted by the police officers to the point at which the confrontation occurred. (M. Tr. 18.) Officer Gaskins described the complainant "as upset, shakey" at the time. (M. Tr. 19.)

The testimony regarding the actual identification is in conflict. The complainant stated that he "identified him right there and knew him

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8/ Neither had the complainant been wearing his glasses at the time of the assault.

right away, instantly." (Tr. 64; see Tr. 68.) Officer Gaskins testified that the complainant looked at appellant "approximately fifteen seconds" before identifying him. (Tr. 94.) The complainant testified that the officers asked him "If I could identify him or, was he the right one" (Tr. 47), to which he replied "Yes" (Tr. 47) or "Yes, that's him." (Tr. 67.) The police officers quoted the complainant variously as having said:

> That is the man that robbed me. [Tr. 185.]
>
> That is the one -- that is the one, one of the ones that yoked me. [Tr. 94; see M. Tr. 17.]
>
> This is the person -- this is the person. [M. Tr. 18.]

The appellant quoted the complainant as having said, "He looks like one of them." (Tr. 217.)

Counsel for appellant was not present at the confrontation.

The complainant testified that his identification was based on both the appellant's clothing and his face. (Tr. 67-68) "I don't make mistakes studying faces and identifying faces." (Tr. 67) His descriptions to the police prior to the confrontation had included no reference to facial characteristics. (Tr. 88, 121-22, 123, 173-74, 179-80; M. Tr. 4, 9-11, 13.) He had not told the officers earlier that appellant had a beard. (Tr. 67; M. Tr. 13.)[9/]

9/ The complainant's only description of his assailants at the preliminary hearing was, "one was tall and one was short." (Tr. 84, 82.)

Following the confrontation, the police took complainant to the hospital, where he remained for a period of hours. (Tr. 70, 73.) He could not recall whether appellant was searched in his presence (Tr. 70),[10] or whether the police had showed him a knife, a wallet or any money (Tr. 70).[11] In the complainant's words: "I didn't pay any attention. After I identified him I didn't pay any attention any more to anyone, but I was taking care of my hurting." (Tr. 72.)[12]

Appellant was taken in the patrol wagon to the Tenth Precinct, and thereafter to the First Precinct for booking. (Tr. 218, 221.) While the record is unclear, it appears that appellant was put in a lineup. (Tr. 221, 230.) If such a lineup was held, there is no indication of the presence of counsel at the time of the lineup.

The defense was alibi. Corroborated by his wife's testimony, appellant testified that during the early evening of November 18, 1967, he

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10/ Compare Tr. 97, 102-03, 185, 218, 233.

11/ Neither the wallet nor the money assertedly taken from the complainant were found in appellant's possession, or presented to the complainant for identification. (Tr. 185-86, 114)

12/ The complainant also stated that he observed appellant for "at least ten minutes" after the identification but before being taken to the hospital, (Tr. 75-76.) During that period, he noted the kind of coat and pants the appellant was wearing, that appellant was tall, and that appellant had a beard. (Tr. 76-77.) The complainant had seen the appellant's coat several times subsequent to the events and prior to trial. (Tr. 230-31.)

was in his apartment at 1450 Irving Street Northwest, Washington, D. C. (approximately four blocks from the scene of the assault), watching television. (Tr. 213.) Subsequently, he joined his wife and some friends in another apartment in the same building. (Tr. 194, 213-14.) At approximately 3:15 a.m. that night, it was decided that appellant would go out and bring back something to eat. (Tr. 195-96, 205, 214-15.) Appellant left the apartment building, started west on Irving Street, N. W., crossed 16th Street, and noted that the store where he had intended to go was closed. (Tr. 215.) He thereupon walked north on the west side of 16th Street, intending to go to the Waffle Shop, at 14th Street and Park Road, for sandwiches. (Tr. 215-16.) As appellant crossed 16th Street, near Park Road, in the direction of 14th Street, he saw Officer Gaskins standing on the corner of 16th Street and Park Road. (Tr. 216, 229.) It was at that point that the officer crossed 16th Street, stopped appellant, and asked appellant to accompany him to 1610 Park Road. (Tr. 216, 232) Appellant stated he had not been walking east on Park Road. (Tr. 232.)

At the time of his arrest, both appellant and his wife were employed. (Tr. 201-03, 240.) Both had been paid the prior Friday, November 17. (Tr. 202-03.)

SUMMARY OF ARGUMENT

I.

The government's case was based essentially on the identification testimony of the complainant. On the basis of testimony developed during a hearing on the defense pre-trial motion to suppress, as well as the testimony at trial, it was clear that the on-the-scene confrontation at which the complainant identified the appellant had been conducted in violation of the appellant's Sixth Amendment right to counsel, as set forth in United States v. Wade, 388 U.S. 218 (1967). In addition, it was further apparent that the confrontation had been unnecessarily suggestive and condlusive to irreparable mistaken identification, in violation of t he appellant's Fifth Amendment right to due process.

The trial court's denial of the defense motion to suppress the identification testimony, as well as its permitting the identification testimony at trial, was error.

II.

The record of the pre-trial motion to suppress, and of the trial itself, established the on-the-scene confrontation between the appellant and the complainant to have been violative of the appellant's Sixth Amendment

right to counsel, and his Fifth Amendment right to due process. The trial court should have excluded the courtroom identification of appellant by the complainant, since the government did not establish by clear and convincing evidence that the in-court identification was of an independent source and not tainted by the on-the-scene confrontation.

III.

The government's case was based almost exclusively on the complainant's on-the-scene identification of the appellant. At the trial, it was apparent that the only other witness who would have seen the complainant's assailants at close range was a night attendant in a building where the assailants were to have fled immediately after the assault. However, that individual, peculiarly available to the government, was never presented by the government in its case-in-chief.

While the defense requested a "missing witness" instruction in the trial court's charge to the jury, the request was denied. The trial court's ruling was error.

ARGUMENT

I. THE TRIAL COURT ERRED IN PERMITTING TESTIMONY REGARDING THE ON-THE-SCENE IDENTIFICATION OF THE ACCUSED.

A. The On-The-Scene Confrontation Denied Appellant His Sixth Amendment Right To Counsel.

The Sixth Amendment guarantee to an accused of assistance of counsel applies to all "critical" stages of criminal proceedings. In Powell v. Alabama, 287 U.S. 45 (1932), the period from arraignment to trial was determined to be such a "critical" stage of the proceedings. 287 U.S. at 57, 69.[13/] In Escobedo v. Illinois, 378 U.S. 478 (1964), and Miranda v. Arizona, 384 U.S. 436 (1966), the guarantee of counsel's presence was determined to apply to pre-arraignment custodial interrogation of an accused. Finally, in United States v. Wade, 388 U. S. 218 (1967), on facts relating to a post-indictment line up, the Supreme Court ruled, inter alia, that in the absence of "substantial countervailing policy considerations . . . against the requirement of the presence of counsel," 833 U. S. at 237, any pretrial confrontation compelled by the government between the accused and the victim or witnesses to a crime to elicit identification evidence are similarly "critical" stages, as to which the Sixth Amendment entitlement applies. Cf. Stovall v. Denno, 338 U.S. 293, 298-99 (1967); Biggers v. Tennessee, 390 U.S. 404 (1968) (Douglas, J., dissenting).

13/ See also Hamilton v. Alabama, 368 U.S. 52 (1961); White v. Maryland, 373 U. S. 59 (1963); Massiah v. United States, 377 U. S. 201 (1964).

It is true, of course, that this Court, in Russell v. United States, No. 21,571 (D.C. Cir. Jan.24, 1969), indicated its general approval of on-the-scene confrontations "which occur within minutes of the witnessed crime," the Wade decision notwithstanding. Slip op. at 6, n. 20. It is submitted, however, that neither the decision in Russell, nor the decisions cited therein, were intended to establish a bar to the application of the Wade holding in all instances of on-the-scene identifications. Indeed, in light of the clear teaching of the Wade decision -- that the Sixth Amendment guarantees the right to counsel's presence wherever it "is necessary to preserve the defendant's basic right to a fair trial," 388 U.S. at 227 -- no such absolute exception could properly be devised.

Rather, the Russell holding was based on the Court's having determined the existence of "substantial countervailing policy considerations" against the requirement of counsel's presence where prompt on-the-scene confrontations are conducted -- (a) the fact "that prompt confrontations in circumstances like those of this case will if anything promote fairness, by assuring reliability," and (b) the desireability of expeditious release of innocent suspects." Slip. op at 7. Similarly, the decision in Bates v. United States, No. 21,434 (D.C. Cir. Dec. 13, 1968), cited in Russell, emphasized that a prompt on-the-scene identification "does not tend to bring about misidentification but rather tends under some circumstances

to insure accuracy." Slip. op. at 3.[14/] Thus, in light of the Court's stated concerns, it is submitted that where it can be shown that particular circumstances in a given case indicate the likelihood, not of reliable identification but of misidentification, as a result of an immediate on-the-scene identification, the Wade decision requires, and this Court's decisions are not inconsistent with, the presence of counsel at any such confrontation.

In this case, the record makes eminently clear that the on-the-scene confrontation between the complainant and appellant was an invitation, not for a reliable identification, but for misidentification. Throughout the testimony, both at trial and at the pre-hearing motions to suppress, the physical condition of the complainant as a result of the beating he had received by his assailants was detailed. As the complainant variously described his circumstances:

> . . . they would hold me and the other one would hit me with his fists, around my body and my head and when I tried to break away again, I saw the flash of a knife and they cut me in my mouth and the blood poured out all over my coat and over my face. [Tr. 22]

14/ As Bates, neither Wright v. United States, ___ U.S. App. D.C. ____, 404 F.2d 1256 (1968), nor Wise v. United States, 127 U.S. App. D.C. 279, 383 F.2d 206 (1967), both cited in the Russell decision, dealt directly with the Sixth Amendment holding of Wade. See, however, this Court's statement in Wise:

> It may be that in a particular case there would be reason, without denying the general principal of prompt identifications, to say that the particular identification at the scene was conducted in such an unfair way that it cannot tolerable be admitted into evidence.

383 F.2d at 210.

. . .my head was hurting, and my chest was hurting, I had two broken ribs and I was pretty sick. . . [Tr. 26]

. . .It is like you've been hit with a sledge hammer and you don't think of time. [Tr. 30]

. . .Well my foot was hurting and I got up off the ground, out of the gutter and sat back here, and my head was hurting. . . [M. Tr. 38.]

. . .my knees was all banged up. [Tr. 39.]

. . .I was hurt. I was suffering from the blows. . . .Mostly on this side and in the mouth and head, here, and on my chest and my rib, broken ribs on this side. [Tr. 42.]

. . .my chest was cracking on me, just to move my chest I would crack. and that was probably the broken ribs. [Tr. 64.]

. . .After I identified [the appellant] I didn't pay any attention any more to anyone, but I was taking care of my hurting. I was pretty bad hurt -- you get broken ribs, and you would know. [Tr. 72.]

. . .I believe I [told the police my money was missing], later on, but I didn't know at the time. I wasn't worried about money then, I was thinking about my health. [Tr. 73.]

. . .Well I couldn't honestly say [how much time elapsed between giving the police a description of the assailants and the officers returned with defendant] Your Honor. It was a matter of time, well, say, I was hurting, you see, and I was beaten on my head and I had headaches, and I had broken ribs where they had pounded me. [M. Tr. 41.]

The police officers' descriptions of the complainant included the following:

. . .Well, first, at first my partner and I thought it was somebody playing, at first, because he was coming from between the cars and getting up and falling down on his knees and then getting back up again. . .[Tr. 121.]

. . . Well he was bleeding. There was blood all over him. He was, as a matter of fact, out in the street and that is what drew my attention to him. [M. Tr. 28.]

> . . . First he kept mumbling and then, you know, we could hear, "I have been robbed, I have been robbed. . . " [M. Tr. 11.]
>
> . . . He had blood coming from his mouth. . . . Blood coming from his mouth and he had bloodstains on his clothes, blood on his clothes. [M. Tr. 4.]
>
> Q. What was [complainant's] condition at [the time of identification]?
>
> A. He was still upset, shaky. [M. Tr. 19.]

Indeed, the complainant was apparently in such poor physical condition that he had difficulty remembering where he first saw the police car and how long it took the police to get to him (Tr. 55-58), he couldn't recall if he had told the police that he was missing anything (Tr. 42-43), he couldn't recall where the police went after they first arrived (Tr. 27, 70) or how long they had been gone prior to the confrontation (Tr. 27, 29-30), and he couldn't recall whether the appellant was searched in his presence or whether anything was presented to him for identification (Tr. 70.) In light of the complainant's condition, in view of the fact that the complainant "was in the hospital for [four?] hours" after the beating he received (Tr. 73) and in view of the fact that he did not have his glasses on (M. Tr. 46-47, 24), the on-the-scene confrontation held that night cannot seriously be considered one which would "if anything promote fairness, by assuring reliability," Wise v. United States, supra, 127 U.S. App. D.C. at 282, 383 F.2d at 209, or one which would tend "to insure accuracy," Bates v. United States, supra, at 3. For this was clearly not a case where the complainant was in full possession of his physical and mental facilities such that the reliability of his identification was a probability.

Neither was the second "substantial countervailing policy consideration" referred to in the Russell decision -- "the desirability of expeditious release of innocent suspects" -- served in this instance. For that concern is clearly dependent on, and its efficacy is directly proportionate to, the ability of the complainant or the witness to offer a reliable judgement. And as outlined above, the circumstances here were such that reliability of identification was more remote than probable. If the choice is between 12 hours delay to arrange a lineup and appoint counsel, and imprisonment based on a hasty ill-considered identification, any reasonable balance of interests must favor the former.

It should be emphasized, in addition, that there was no reason why the confrontation between the defendant and the complainant had to be conducted at that moment. The defendant was already in police custody prior to the confrontation.[14/] And assuming his arrest to have been a valid one, he could have been detained for a lineup later that day. Such a course would have permitted the complainant to have been treated at a hospital for his injuries, and to have regained his composure. At the same

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14/ The trial judge apparently determined that appellant was under arrest prior to the identification. See M. Tr. 54-56. That ruling was consistent with the officer's testimony. See, e.g., M. Tr. 15-16, 17. Compare Hicks v. United States, 127 U.S. App. D.C. 209, 382 F.2d 158 (1967).

time, counsel could have been retained by, or appointed for, the appellant. Such delay as might have resulted would certainly not have been a lengthy one. And given the complainant's condition after the beating he had received, the delay would clearly have permitted a more, not less, reliable identification of the defendant if he had, in fact, been one of the assailants.[15/]

In Wade, the Supreme Court made clear that counsel's presence at pre-trial confrontations is necessary, inter alia, for an accused to exercise "his right meaningfully to cross-examine the witnesses against him." 388 U.S. at 227. While the Court's opinion spoke in terms of a lineup, the rationale underlying the holding is equally applicable to any pre-trial confrontation,[16/] and even more emphatically to sole-suspect confrontations:

> . . . the defense can seldom reconstruct the manner and mode of lineup identification for judge or jury at trial. . . . The impediments to an objective observation are increased when the victim is the witness. Lineups are prevalent in rape and robbery prosecutions and present a particular hazard that a victim's understandable outrage may excite vengeful or spiteful motives. In any event, neither witnesses nor lineup participants are apt to be alert for conditions prejudicial to the suspect. And if they were, it would likely be of scant benefit to the suspect since neither witnesses nor lineup participants are likely to be schooled in the detection of suggestive influences. Improper influences

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15/ Compare Stovall v. Denno, supra, where the hospital identification was one of "compelling urgency" -- where "the stabbing victim, the sole source of identification, was in danger of death." Biggers v. Tennessee, 390 U.S. 404, 407 (1968)(Douglas, J., dissenting). Here, of course, no such "compelling urgency" was present.

16/ . . . the principle of Powell v. Alabama and succeeding cases requires that we scrutinize any pretrial confrontation of the accused to determine whether the presence of his counsel is necessary to preserve the defendant's basic right to a fair trial as affected by his right meaningfully to cross-examine the witnesses against him and to have effective assistance of counsel at the trial itself. It calls upon us to analyze whether potential substantial prejudice to defendant's right inheres in the particular confrontation and the ability of counsel to help avoid that prejudice.

388 U.S. at 227 (emphasis added)

> may go undetected by a suspect, guilty or not, who experiences the emotional tension which we might expect in one being confronted with potential accusers. . . . Moreover, any protestations by the suspect of the fairness of the lineup made at trial are likely to be in vain; the jury's choice is between the accused's unsupported version and that of the police officers present. In short, the accused's inability effectively to reconstruct at trial any unfairness that occurred at the lineup may deprive him of his only opportunity meaningfully to attack the credibility of the witness' courtroom identification.

388 U.S. at 230-32.

In this case, "the accused's inability effectively to reconstruct at trial any unfairness that occurred" at the confrontation with the complainant was particularly evident, and to his prejudice. For while the government's case was based exclusively on the complainant's identification of the defendant, the testimony regarding the circumstances attending the confrontation was both conflicting and incomplete in a variety of respects, even among the government's own witnesses. For example, while the complainant stated he had identified appellant "instantly" (Tr. 64), Officer Gaskins testified the complainant looked at appellant "approximately fifteen seconds" before identifying him. (Tr. 94.) Both the fashion in which the officers asked complainant to identify appellant, and his response, were uncertain. (E.g., Tr. 47, 67, 94, 185; M. Tr. 17, 18.) Whether the officers in the patrol wagon had spoken to the complainant prior to the identification, and the proximity to the confrontation by others, or comments made by them at the time, were unknown. These and other matters -- critical to determining the

propriety of the confrontation -- could not effectively be reconstructed by counsel "probing in the dark" on cross examination.[17/]

It should be emphasized that appellant, in arguing his position in this regard, does not urge this Court to mechanically extend the Wade requirement of counsel to all prompt on-the-scene confrontations. For the "substantial countervailing policy considerations" so well articulated in the Russell decision are both binding as a matter of decisional precedent and realistic as a matter of law enforcement. At the same time, however, it must be emphasized that the Russell and Bates holdings are built on a premise of reliability -- the reliability of fresh recollection. But where, as here, the witness to make the identification is a badly injured victim, "fresh recollection," if a possibility, is unlikely to be reliable. Accordingly, it is appellant's position that where, as here, an arresting officer has knowledge of the impaired condition of a witness prior to the time of confrontation; where, as here, the officer has reason to believe that the witness' condition may preclude objective identification; and where, as here, there is no overriding reason not to hold a lineup, a one-man confrontation in the absence of counsel falls within the area of protection accorded by the Wade decision.

17/ See Wade, supra, 388 U. S. at 240-41:

> Counsel is then in the predicament in which Wade's counsel found himself -- realizing that possible unfairness at the lineup may be the sole means of attack upon the unequivocal courtroom identification, and having to probe in the dark in an attempt to discover and reveal unfairness, while bolstering the government witness' courtroom identification by bringing out and dwelling upon his prior identification.

B. The On-The-Scene Confrontation Denied Appellant Due Process Of Law.

In Stovall v. Denno, the Supreme Court emphasized that "a claimed violation of the due process of law in the conduct of a confrontation depends on the totality of circumstances surrounding it." 388 U.S. at 302. In attempting to fashion some meaningful framework of criteria within which to assess the "totality of circumstances," the District Court in United States v. O'Connor, 282 F. Supp. 963 (D.D.C, 1968), concluded that the following factors were relevant in evaluating a challenged pre-trial confrontation: 18/

> (1) Was the defendant the only individual that could possible be identified as the guilty party by the complaining witness, or were there others near him at the time of the confrontation so as to negate the assertion that he was shown alone to the witness?
>
> (2) Where did the confronation take place?
>
> (3) Were there any compelling reasons for a prompt confrontation so as to deprive the police of the opportunity of securing other similar individuals for the purpose of holding a line-up?
>
> (4) Was the witness aware of any observation by another or other evidence indicating the guilt of the suspect at the time of the confrontation?
>
> (5) Were any tangible objects related to the offense placed before the witness that would encourage identification?
>
> (6) Was the witness' identification based on only part of the suspect's total personality?

18/ See also Clemons v. United States, No. 18,846 (D.C. Cir. Dec. 6,1968) at 23, n.

(7) Was the identification a product of mutual reinforcement of opinion among witnesses simultaneously viewing defendant?

(8) Was the emotional state of the witness such as to preclude objective identification?

(9) Were any statements made to the witness prior to the confrontation indicating to him that the police were sure of the suspect's guilt?

(10) Was the witness' observation of the offender so limited as to render him particularly amenable to suggestion, or was his observation and recollection of the offender so clear as to insulate him from a tendency to identify on a less than positive basis?

An application of those criteria to the facts of this case, it is submitted, indicate a clear denial of due process:

(1) Appellant was the only individual shown to the complainant. (M. Tr. 18.)

(2) The confrontation took place at the scene of the assault. Cf. Wise v. United States, supra, at 282, 383 F.2d at 209.

(3) There were no compelling reasons why the police could not have delayed the confrontation for a later lineup. The "lookout" had been given to the police radio dispatcher; Officer Matson had concluded his investigation of the area; but for appellant, OfficerGaskins saw no one else in the vicinity; the appellant was in custody; and the complainant, while severely injured, was not in danger of death. Compare Jackson v. United States, No. 21,327 (D.C. Cir. Feb. 3, 1969) at 6-7. In short, no urgency of the type presented in the Stovall or Simmons[19/] cases was present here. See Biggers v. United

States, 390 U. S. 404, 406-407 (1968) (Douglas, J., dissenting).

(4) While it is unclear from the transcript, the complainant here may have heard the statement of Mr. Klendena to the police from the third floor of 1610 Park Road, just prior to the confrontation, that appellant "was the person." (M. Tr. 8.)

(5) The officers testified that they found a knife during the course of a search of appellant held in the complainant's presence. (Tr. 97, 102-03.) It appears, however, that if such a search occurred (see, e.g., Tr. 218), it was after the complainant's identification.

(6) It is submitted that any reasonable reading of the record testimony indicates the complainant's identification to have been based in great part,, if not entirely, on two items appellant's clothing -- "dark coat and light pants." While the complainant made much of his recollection of facial characteristics (Tr. 67), his pre-confrontation descriptions to the police had included no reference to appellant's goatee (Tr. 67) -- certainly a conspicuous feature -- nor to any other facial characteristic. (Tr. 88, 121-122, 123, 173-74, 179-80; M. Tr. 4, 9-11, 13.)

(7) See (4) above.

(8) The emotional state of the complainant at the time of the confrontation most clearly precluded an objective identification. As indicated in the statement of facts (p. 11, supra) and in the preceeding argument (pp.18-20, supra), the complainant's physical condition at the time of the confron tation was extremely poor -- he was cut, beaten and sick. In addition, even government counsel characterized him as "a man you might say was a

little excitable, a man you might say is not the calmest man in the world, and there is no use trying to hide that fact." (Tr. 256.) And it is most likely that at the time of the confrontation, this exciteable nature, outraged by the beating he had just received, was driven by the same desire expressed from witness stand: "I want justice." (M. Tr. 46.) The appellant was the only individual at the time from whom he might exact his "justice."

(9) The record is unclear precisely what statements were made to the complainant regarding the appellant prior to the identification. It is known that the complainant was among other police officers when appellant was presented to him. (M. Tr. 8, 17-18.) But more importantly, and certainly more effectively influencing than any oral statement, was the fact that at the time he was shown to the complainant, appellant was being tightly held by Officer Gaskins -- one hand gripping appellant's right arm, the other hand on the back of appellant's neck. (Tr. 96, 216-17, 232; M. Tr. 7, 14-16.) The impression created in the complainant's mind was unmistakeable: "they brought him back for identification, to be identified." (Tr. 64.) The complainant obliged.

(10) The complainant's observation of the tall assailant he asserted appellant to be was highly limited. The tall assailant initially grabbed the complainant from behind (Tr. 21, 31-32), and remained behind him throughout the encounter (Tr. 32; M. Tr. 44, 45.) And it was only for one moment -- as the tall assailant got up off the ground to run away -- that the complainant

claimed to have seen his face. (Tr. 28, 35, 38, 39, 40-41; M. Tr. 44.) Conspicuously, however, complainant's only description to the police officers who arrived was: Negro male, dark coat, light pants. (Tr. 88, 121-22, 174; M. Tr. 4, 9-10, 12, 13.) To be recalled also is the fact that it was nighttime, even though street lighting was apparently available; the complainant's view of the tall assailant was while on the ground, in the gutter, between two parked cars (Tr. 21, 40-41), after having been severely beaten; and the complainant was without his glasses. (M. Tr. 46-47.) Accordingly, the circumstances attending the complainant's view of his assailant during the assault were indeed "so limited as to render him particularly amenable to suggestion." And given the circumstances of the subsequent confrontation, it is submitted that "a tendence to identify on less than a positive basis" was a virtual certainty.

In addition to the specific criteria referred to above, this Court has indicated that the "totality of circumstances" bearing on the due process question under Stovall includes the absence of counsel. Thus, even if the Court deems that absence to have been an excusable one under the Bates and Russell interpretations of the Wade decision, the lack of counsel's presence nonetheless weighs heavily in this case in determining the due process question under Stovall. Russell v. United States, supra, at 9.

Viewing the "totality of circumstances" attending the confrontation in this case, therefore, it is submitted that due process has indeed been denied. The

fleeting view of the assailant by the complainant during the assault, the condition of the complainant at the time of confrontation, the presence of the police officers, the comment from Mr. Klendena, the scruff-of-the-neck presentation of the appellant by Officer Gaskins, the absence of counsel -- none of these factors, particularly in the aggregate, were conducive to basic "fairness" to appellant.

Appellant again acknowledges this Court's decisions postulating the general permissibility of one-man, on-the-scene showups accurring "within minutes of the witnessed crime." Russell v. United States, supra, at 6, n. 20, and cases cited therein. However, the Court has alsc acknowledged that particular circumstances in a given case may render that general postulate ineffective. Thus, in the Wise decision, it was stated:

> It may be that in a particular case there would be reason, without denying the general principle of prompt identifications, to say that the particular identification at the scene was conducted in such an unfair way that it cannot tolerably be admitted into evidence.

383 F. 2d at 210. Appellant submits that this is just such a case.

II. THE TRIAL COURT ERRED IN PERMITTING THE COURTROOM IDENTIFICATION OF APPELLANT.

A courtroom identification of the appellant was made by the complainant. (Tr. 28-29.) The admission of that testimony was error.

Defense counsel had challenged the legal propriety of the on-the-scene confrontation in the pre-trial motion to suppress. And for the reasons set forth above, it was clear from the testimony at both the pre-trial motions proceeding and at trial, that no counsel had been present at the confrontation, and that the confrontation was highly suggestive and conducive to irreparable mistaken identification.

Accordingly, once it had been shown that the on-the-scene confrontation was tainted, the burden shifted to the government to "establish by clear and convincing evidence that the in-court identification [was] based upon observations of the suspect other than the [tainted] identification." United States v. Wade, supra, at 240; Clemons v. United States, supra, at 9.

In this case, however, the government did not attempt to establish any independent basis for the complainant's in-court identification (no doubt relying on the trial judge's denial of the defense motion to suppress). But even if the government had made such an effort, the facts of record indicate that no such independent source could have been shown. Except for the brief moment during the struggle when the complainant claimed to have seen the tall assailant, the confrontation was the only time appellant had been observed by the complainant. And the descriptions offered to the police officers by the complainant prior to appellant's presentation to him had been restricted to: Negro male, dark coat, light pants. For at least ten minutes following the identification, however,

the complainant had the appellant under observation. (Tr. 75-76.) During the period the complainant observed appellant's face, his height, his coat and his pants. (Tr. 76-77.)

Thus, the initial confrontation having been tainted, in light of the opportunity of the complainant at that time to observe the appellant for an extended period, and in the absence of any showing of an independent source for the in-court identification, admission of the courtroom identification of appellant was error. "[I]t is a matter of common experience that, once a witness has picked out the accused . . ., he is not likely to go back on his word later on. . . ." United States v. Wade, supra, at 229. Cf. Sera-Leyva v. United States, No. 20, 619 (D.C. Cir. Feb. 18, 1969) at 6-7; Gross v. United States, No. 20,953 (D.C. Cir. Feb. 19, 1969) at 5, n. 3.

III. THE TRIAL COURT ERRED IN DENYING THE DEFENSE REQUEST FOR A "MISSING WITNESS" INSTRUCTION.

At the trial, the two officers who first encountered the complainant following his assault testified that the complainant had said that the two assailants had run toward an apartment building at 1610 Park Road. Mr. Klendena testified that he had seen the two assailants enter the building immediately following the assault. (Tr. 134.) Officer Matson stated that immediately after encountering the complainant, and prior to Officer Gaskins' returning to the scene with appellant, he entered the building

to search it. (Tr. 180, 190.) He further testified that there was a night attendant -- apparently the only individual other than the complainant who would have been able to observe the assailants closely -- was never presented by the government at the trial.

At the conclusion of the trial, counsel for appellant requested that the judge include the "missing witness" instruction in his charge to the jury. (Tr. 250.) The Junior Bar statement of that instruction (see Tr. 246-47) is as follows:

> If a witness who could have given material testimony on an issue in this case was peculiarly available to one party, was not called by that party and his absence has not been sufficiently accounted for or explained, then you may, if you deem it appropriate, infer that the testimony of the witness would have been unfavorable to the party which failed to call him. 20/

The trial judge, however, denied the request. (Tr. 252.) Appellant submits that the denial was erroneous.

A missing witness instruction is proper where "a party has it peculiarly within his power to produce witnesses whose testimony would elucidate the transaction." Graves v. United States, 150 U.S. 118, 121 (1893); Stewart v. United States, No. 20,983 (D.C. Cir. Feb. 10, 1969) at 6. Here, while the trial judge determined that no showing had been made that the testimony of the night attendant would be material, it is submitted that

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20/ Criminal Jury Instructions for the District of Columbia, Junior Bar Section, Bar Association of The District of Columbia (1966), at 9.

such a conclusion fairly defies the record in this case. As indicated above, that individual was the only person other than the complainant who might have seen the assailants at close range. As trial counsel for appellant stated, the attendant could possibly have either identified or exonerated the appellant. (Tr. 250.) And, of course, that testimony would have been particularly critical in this case, since the government's case depended almost exclusively on the identification testimony of the complainant -- a beaten, bloodied, sick man who had only glimpsed the tall assailant. "[I]f indeed [the night attendant] had testified adversely to the Government, the jury's verdict might well have been different." Stewart v. United States, supra, at 7.

Moreover, it appears that the night attendant would have been peculiarly available to the government. Clearly he was not available to the defense, for appellant's trial counsel indicated his inability to locate him. (Tr. 250.) Although counsel for the government stated that "if defense counsel could't get [him] in here we certainly couldn't either." (Tr. 252), that explanation is anything but sufficient. Having interviewed the man, Officer Matson was at least generally familiar with the attendant. And surely, in light of the plethora of reports which had been prepared by Officers Matson and Gaskins relating to the matter (see, e.g., Tr. 114, 116, 117; M. Tr. 32), there should have been sufficient information available to the government

to locate the individual. As the Court in Wesson v. United States, 172 F.2d 931, 936 (8th Cir. 1949), stated:

> Defendant was clothed with the presumption of innocence and it was incumbent upon the government to prove his guilt beyond a reasonable doubt. The failure of the government, under the circumstances disclosed, to call [this witness] justified, if it does not compel, the inference that their testimony would have been against the government.

The instruction requested should have been given.

Alternatively on this point, if the Court is not of the view that the present state of the record required giving the missing witness instruction, appellant submits that this case falls within the decision in Stewart v. United States, supra, and that a similar disposition is required. In that case, this Court remanded the case to the DistrictCourt, to determine fully the availability of the witness to the parties, "practically, as well as physically." Here, as in Stewart,

> . . .the trial court learned from defense counsel that he had made unsuccessful efforts of undetermined extent to ascertain [the witness'] whereabouts.

Id. at 7. However, as to the government, one is left only to speculate as to its capability to produce the night attendant, particularly in light of government counsel's enigmatic explanation. Compare Wynn v. United States, ___ U.S. App. D.C. ____, 397 F.2d 621, 625, n. 23 (1967). Accordingly, if the record does not establish the "peculiar availability" of the night attendant, it is at best incomplete on the point. And for want of a "suitable inquiry" into the witness' availability by the trial judge in this case, Stewart v. United States, supra, at 7, a remand for a hearing on the matter is required.

CONCLUSION

Appellant prays that this Court reverse his conviction and remand with instructions to dismiss the indictment against him. Alternatively, the Court is requested to reverse the conviction and remand for a new trial, to remand for a hearing on the existence of an independant source for the complainant's courtroom identification of appellant, or to remand for a hearing to determine the availability to the government of the night attendant (the "missing witness").

Respectfully submitted,

Edward P. Taptich

CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing Brief has been personally served at the Office of the United States Attorney, United States District Courthouse, Washington, D. C., this fifteenth day of April, 1969.

Edward P. Taptich

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

UNITED STATES OF AMERICA,

Appellee,

v.

LEROY M. RUSSELL,

Appellant.

No. 22,305

PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC

Appellant Leroy M. Russell, by appointed counsel, pursuant to Rules 35 and 40 of the Federal Rules of Appellate Procedure, and to Rule 14 of the Rules of this court, respectfully requests that a rehearing be ordered in the captioned appeal either before the division of the court which had decided the appeal or before the court sitting en banc. In support of this petition, the following is submitted:

A. The Order Affirmance In This Case Disregards The Particular Facts Involved, Is Inconsistent With Prior Rulings Of This Court, And Ignores The Questions Of Exceptional Importance Presented.

On May 22, 1968, after trial by jury in the United States District Court, appellant was found guilty of assault with intent to commit robbery, and on July 12, 1968, he was sentenced to three to nine years imprisonment. This appeal followed.

In the Brief for Appellant, filed April 15, 1969, it was argued, inter alia, that the trial judge had erred (1) in permitting testimony at trial regarding the

on-the-scene identification of appellant, (2) in permitting the courtroom identification of the appellant, and (3) in denying a defense request for a "missing witness" instruction. Included among appellant's arguments were detailed contentions of a denial of appellant's Fifth and Sixth Amendment rights under Stovall v. Denno, 388 U.S. 293 (1967) and United States v. Wade, 388 U.S. 218 (1967). Appellee United States filed no brief.

On September 26, 1969, this court (by Judges Miller, Tamm and Wright) affirmed appellant's conviction by order.

Because the court's affirmance was made without any statement of reasons, and in the absence of any definitive statement of the government's position as to appellant's arguments on appeal, appellant is unable to know on precisely what basis his conviction was affirmed. (See pp.10-14, infra.) Hence, appellant is unable to determine the extent to which the actual legal bases for the order affirmance must be reconsidered to "secure or maintain uniformity" in the decisions of this court on those points. Rule 35(a), Federal Rules of Appellate Procedure. Nonetheless, it is at least clear that, in light of the particular facts here involved, the result reached is not supported by prior decisions of this court, and that this case does present questions of exceptional importance.

In the Wade case, the Supreme Court ruled, inter alia, that in the absence of "substantial countervailing policy considerations . . . against the requirement of the presence of counsel," 388 U.S. at 237, any pretrial confrontation compelled by the government between the accused and the victim or witnesses to a crime to elicit identification evidence is a "critical" stage in a criminal proceeding, to which the

Sixth Amendment entitlement to counsel applies. Cf. Stovall v. Denno, supra, 388 U.S. at 298-99 (1967); Biggers v. Tennessee, 390 U.S. 404 (1968) Douglas J., dissenting).

In Russell v. United States, ___ U.S. App. D.C. ___, 408 F2d 1280 (1969), this court indicated its general approval of on-the-scene confrontations "which occur within minutes of the witnessed crime," the Wade decision notwithstanding. 408 F.2d at 1284, n.20. Since Russell, this court has treated the question of an accused's right to counsel at confrontations occurring shortly after an offense in only one other case, Solomon v. United States, ___ U.S. App. D.C. ___, 408 F.2d 1306 (1969), where another on-the-scene identification in the absence of counsel was approved. This case, however, is factually dissimilar from both Russell and Solomon, and raises critical questions regarding the applicability and reach of the Russell holding.

The exception to the Wade requirement of counsel was based on the existence of two "substantial countervailing policy considerations" -- (a) the fact that "prompt confrontations in circumstances like those of this case will 'if anything promote fairness, by assuring reliability,'" and (b) "the desirability of expeditious release of innocent suspects." 408 F.2d at 1284. Similarly, the decision in Bates v. United States, ___ U.S. App. D.C. ___, 405 F.2d 1104 (1968), cited in Russell, emphasized that a prompt on-the-scene identification "does not tend to bring about misidentification but rather tends under some circumstances to insure accuracy." 405 F.2d at 1106. The necessary corrollary is that, where the particular circumstances in a given case indicate the likelihood not of reliable identification but of misidentification as a result of an immediate on-the-scene identification, the Wade decision requires, and this Court's Russell decision does not exempt,

the presence of counsel at any such confrontation.[1/]

In this case, the government's case was built essentially on an identification by the complainant immediately following his having been assaulted. Yet the on-the-scene confrontation between the complainant and appellant was an invitation, not for a reliable identification, but for misidentification. Throughout the testimony, both at trial and at the pre-hearing motions to suppress, the physical condition of the complainant as a result of the beating he had received by two assailants was fully detailed. As the complainant variously described his circumstances:

> . . . they would hold me and the other one would hit me with his fists, around my body and my head and when I tried to break away again, I saw the flash of a knife and they cut me in my mouth and the blood poured out all over my coat and over my face. [Tr. 22][2/]
>
> . . . my head was hurting, and my chest was hurting, I had two broken ribs and I was pretty sick. . . [Tr. 26]
>
> . . . It is like you've been hit with a sledge hammer and you don't think of time. [Tr. 30]
>
> . . . Well my foot was hurting and I got up off the ground, out of the gutter and sat back here, and my head was hurting. . . [M. Tr. 38.]
>
> . . . my knees was all banged up. [Tr. 39.]
>
> . . . I was hurt. I was suffering from the blows. . . . Mostly on this side and in the mouth and head, here, and on my chest and my rib, broken ribs on this side. [Tr. 42.]
>
> . . . my chest was cracking on me, just to move my chest I would crack, and that was probably the broken ribs. [Tr. 64.]

1/ Compare, e.g., this Court's statement in Wise v. United States, 127 U.S.App. D.C. 279, 383 F.2d 206, 210 (1967):

> It may be that in a particular case there would be reason, without denying the general principal of prompt identifications, to say that the particular identification at the scene was conducted in such an unfair way that it cannot tolerably be admitted into evidence.

2/ References to the transcript of the trial proceedings held May 20-21, 1968, will appear: "Tr. __." References to the transcript of the pretrial motions proceeding held May 16, 1968, will appear: "M. Tr. ___."

> . . .After I identified [the appellant] I didn't pay any attention any more to anyone, but I was taking care of my hurting. I was pretty bad hurt -- you get broken ribs, and you would know. [Tr. 72.]
>
> . . .I believe I [told the police my money was missing], later on, but I didn't know at the time. I wasn't worried about money then, I was thinking about my health. [Tr. 73.]
>
> . . . Well I couldn't honestly say [how much time elapsed between giving the police a description of the assailants and the officers returned with defendant] Your Honor. It was a matter of time, well, say, I was hurting, you see, and I was beaten on my head and I had headaches, and I had broken ribs where they had pounded me. [M. Tr. 41.]

The police officers' descriptions of the complainant included the following:

> . . .Well, first, at first my partner and I thought it was somebody playing, at first, because he was coming from between the cars and getting up and falling down on his knees and then getting back up again. . . [Tr. 121.]
>
> . . .Well he was bleeding. There was blood all over him. He was, as a matter of fact, out in the street and that is what drew my attention to him. [M. Tr. 28.]
>
> . . .First he kept mumbling and then, you know, we could hear, "I have been robbed, I have been robbed. . ." [M. Tr. 11]
>
> . . .He had blood coming from his mouth. . . . Blood coming from his mouth and he had bloodstains on his clothes, blood on his clothes. [M. Tr. 4.]
>
> Q. What was [complainant's] condition at [the time of identification]?
> A. He was still upset, shaky. [M. Tr. 19.]

Indeed, the complainant was in such poor physical condition that he had difficulty remembering where he first saw the police car and how long it took the police to get to him (Tr. 55-58), he couldn't recall if he had told the police that he was missing anything (Tr. 42-43), he couldn't recall where the police went after they first arrived (Tr. 27, 70) or how long they had been gone prior to the confrontation

(Tr. 27, 29-30), and he couldn't recall whether the appellant was searched in his presence or whether anything was presented to him for identification (Tr. 70.)

In light of the complainant's condition, in view of the fact that the complainant "was in the hospital for [four?] hours" after the beating he received (Tr. 73) and in view of the fact that he did not have his glasses on (M. Tr. 46-47, 24), the on-the-scene confrontation held that night cannot seriously be considered one which would "if anything promote fairness, by assuring reliability," Wise v. United States, 127 U.S.App.D.C. 279, 282, 383 F.2d 206, 209 (1967), or one which would tend "to insure accuracy," Bates v. United States, supra, 405 F.2d at 1106. For this was clearly not a case where the complainant was in full possession of his physical and mental facilities such that the reliability of his identification was a probability.

Neither was the second "substantial countervailing policy consideration" referred to in the Russell decision -- "the desirability of expeditious release of innocent suspects" -- served in this instance. For that concern is clearly dependent on, and its efficacy is directly proportionate to, the ability of the complainant or the witness to offer a reliable judgement. And as outlined above, the circumstances here were such that reliability of identification was more remote than probable.

Moreover, there was no reason why the confrontation between the defendant and the complainant had to be conducted at that moment. The defendant was already in police custody prior to the confrontation. And assuming his arrest to have been a valid one, he could have been detained for a lineup later that day. Such a course would have permitted the complainant to have been treated at a hospital for his injuries, and to have regained his composure. At the same time, counsel could

have been retained by, or appointed for, the appellant. Such delay as might have resulted would certainly not have been a lengthy one. And given the complainant's condition after the beating he had received, the delay would clearly have permitted a more, not less reliable identification of the appellant if he had, in fact, been one of the assailants.[3/]

In should be emphasized additionally that the trial judge never specifically ruled on the Wade point (see M. Tr. 56-57) -- he made no findings regarding either the complainant's condition or the need ofr an immediate confrontation.[4/] And, of course, the order affirmance by this court reaches no conclusion in either regard. However, if the result reached by this court is intended to indicate that the Russell test is merely one of time -- that an on-the-scene confrontation in the absence of counsel shortly after an offense is valid, regardless of the physical condition of the identifying individual or the need for the confrontation -- then the court's affirmance here ignores the basis for the Russell holding and belies the caveats of the Wise, Bates and Mason decisions.[5/] Rehearing on this matter is fully warranted.

Rehearing is also warranted as to the Stovall point. Again because this court has offered no statement of reasons, appellant cannot know the basis for the court's apparent disagreement with appellant's arguments in this regard. However, for the reasons set forth in the Bri ef for Appellant (pp. 25-30), it is submitted

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3/ Compare Stovall v. Denno, supra, where the hospital identification was one of "compelling urgency" -- where "the stabbing victim, the sole source of identification, was in danger of death." Biggers v. Tennessee, 390 U.S. 404, 407 (1968) (Douglas, J., dissenting). Here, of course, no such "compelling urgency" was present.

4/ See Bates v. United States, supra, 405 F.2d at 1106:

> Prudent police work would confine these on-the-spot identifications to situations in which possible doubts as to identification needed to be resolved promptly; absent such need the conventional line-up viewing is the appropriate procedure.

And see Mason v. United States, No. 21,818 (D.C. Cir. June 30, 1969), indicating the Russell exception not to be applicable "[w]here time is not a factor." Slip op. at 4-5.

5/ Notes 1, 4, supra.

that the apparent rejection of appellant's contentions cannot be squared with either the Stovall holding by the Supreme Court, or this court's decision in Clemons v. United States, ___U.S. App. D.C. ___, 408 F.2d 1230 (1968), cert. denied, 394 U.S. 964 (1969).

Certainly, the affirmance here finds no support in prior decisions of this court regarding the due process question. For in none of this court's decisions was the sole identifying individual in as physically impaired a condition as the complainant here. Moreover, this is not a case like Wise or Solomon, where the accused was constantly in view, from the time of the offense until the time of apprehension. Unlike Bates, Jackson,[6/] Young,[7/] Russell and Stewart,[8/] the complainant here did not have an extended opportunity to observe the assailant appellant was asserted to be. Equally important, unlike the Russell, Solomon, Stewart and Young cases, there was no other circumstantial evidence which would have established appellant to have been one of the complainant's assailants. Indeed, the "external" facts of record indicate just the contrary. For while the assault was described as an extended, violent, bloody encounter with appellant supposedly struggling with the complainant in a street gutter throughout the event, appellant at the time of his apprehension was neither perspiring nor out of breath, and his clothes were neither wrinkled,dirty nor bloody. (Tr. 113, 191, 225, 229-30.) Thus, this is not an instance where the government's case was a strong one -- where the victim's identification was merely cumulative. Compare Solomon, supra, 408 F.2d at 1309. Rather, the victim's identification here was, for all intents and purposes, the sole basis of the prosecution's case.

6/ Jackson v. United States, ___U.S. App. D.C. ___, 412 F.2d 149 (1969).
7/ Young v. United States, No. 21,504 (D.C. Cir. Jan. 24, 1969).
8/ Stewart v. United States, No. 20,983 (D.C. Cir Feb. 10, 1969).

It should also be noted that the trial judge's ruling on the Stovall point (M. Tr. 57) occurred before this court's Clemons decision, and thus was made without the guidance of this court in his evaluation of the evidence presented on the defense motion to suppress. See McRae v. United States, No. 21,980 (D.C. Cir June 10, 1969). Neither was there any determination by the trial judge whether the in-court identification of appellant was proper as having an independent source. See Gross v. United States, No. 20,953 (D.C. Cir. Feb. 19, 1969). Thus, since this court did not attempt to explain its view of the facts of this case in its affirmance, there has yet to be made any specific judicial determination regarding either the suggestiveness of the confrontation here challenged under the tests outlined in Clemons (e.g., 408 F.2d at 1245, n. 16) or whether the in-court identification was of an independent source.

While the trial judge determined the on-the-scene confrontation in this case to contain "no unreasonable suggestion" (M. Tr. 57), the judge's own statement of reasons for that conclusion do not withstand scrutiny. The stated bases for his determination were: (1) the lighting conditions were good (M. Tr. 56-57); (2) the time between the offense and the identification not great (M. Tr. 57); and (3)

> The Officer did not say anything to the effect of "I have caught him, sir," -- there was nothing of that kind but both the officer and the complainant said that he was brought back for the purpose of identification by the complaining witness, and the complaining witness said that this is what he understood he was brought back for, to find out whether or not this was the man and if he could identify him. [M. Tr. 57.]

However, in terms of the suggestiveness of the confrontation, the second item relied on by the judge is irrelevant. Indeed, if time has any relevance to suggestiveness, the immediate production of a suspect would suggest to the victim that the apprehension was the product of hot pursuit by the police -- and invitation for identification. Moreover, the third factor relied on by the judge (if his statement was intended to mean

that the complainant did not think the police "had their man") simply does not conform to the record evidence. For the complainant's impression at the time of the confrontation is reflected in his own testimony at trial: "they [the police] brought him back . . . to be identified." (Tr. 64.)

Unmentioned by the judge -- and presumably not felt to be determinative -- were at least the following facts: (1) the complainant was in a physically impaired state; (2) the appellant was being tightly held by Officer Gaskins at the time of the confrontation -- one hand gripping appellant's right arm, the other hand on the back of appellant's neck (Tr. 96, 216-17, 232; M. Tr. 7, 14-16); (3) appellant was shown to the complainant at a patrol wagon which had arrived, in the presence of at least three police officers. (M. Tr. 8, 17-18); (4) immediately prior to the confrontation, a Mr. Klendena, from his third floor window "said that was the person." (M. Tr. 8.) Yet, as noted above, these are among the types of circumstances which this court indicated in C lemons to be essential to a proper evaluation of the "totality of circumstances" in deciding a Stovall challenge.

In sum, therefore, reconsideration on this aspect of the appeal is likewise required.

B. The Absence Of An Opinion By This Court Substantially Impairs Appellant's Effective Utilization Of Further Appellate Entitlements.

At this point, appellant's further review entitlements include (a) a petition for reconsideration or rehearing by the division of the court which decided the appeal; (b) a suggestion for hearing or rehearing by the court en banc; (c) a petition for certiorari in the United States Supreme Court. In the absence of a statement of reasons for the result reached by the sitting division, however, appellant cannot effectively utilize those entitlements.

Rule 40(a) of the Federal Rules of Appellate Procedure provides that a petition for rehearing

> . . . shall state with particularity the points of law or fact which in the opinion of the petitioner the court has overlooked or misapprehended and shall contain such argument in support of the petition as the petitioner desires to present.

Similarily, Rule 35(a) of those Rules states that a hearing or rehearing en banc

> . . . is not favored and ordinarily will not be ordered except (1) when consideration by the full court is necessary to secure or maintain uniformity of its decisions, or (2) when the proceeding involves a question of exceptional importance.

Without some indication of the basis for the court's decision in this case, however, it is impossible for appellant to know which "points of law or fact . . . the court [may have] overlooked or misapprehended," if such be the case. Neither can the appellant know in what respects a modification of the basis for the decision may arguably be "necessary to secure or maintain uniformity of [the court's] decisions." As a consequence, in the face of the heavy burden of persuasion in requests for rehearing -- by the deciding panel or by the court en banc -- the appellant is left only to speculate as to the precise legal grounds for the decision being challenged. Indeed, in this case, there is not even a government brief responding to the appellant's contentions of error, to which appellant might look and assume an agreement by the court.

The same practical problem pertains with regard to the filing of a petition for certiorari in the Supreme Court. The onerous burden of persuasion involved in a successful pursuit of certiorari is well known. See, e.g., Rule 19.1(b) of the U. S. Supreme Court Rules. Indeed, as the September 25, 1969, letter to appellant and counsel by the Clerk of this Court acknowledges:

> The bar is aware of the discretionary nature of the review on certiorari and that certiorari is not granted "to review evidence and discuss specific facts." United States v. Johnston, 268 U.S. 220, 227.

Yet in a case like this, where(at least as to the Wade point) there have been no findings by the District Court, where the government has not briefed its position on the merits of appellant's contentions of error, and where this court has added only the word "affirmed" in considering an appellant's legal contentions on appeal, a petitioner for certiorari is effectively relegated to a "review of the evidence" of his case and a reiteration of the arguments presented to the Court of Appeals -- a likely invitation for denial of the certiorari request. The intermediate appellate step, therefore, will neither have apprised the appellant of the appropriateness of a request for certiorari, nor will it have isolated the legal issues deemed controlling, on the basis of which the Supreme Court might evaluate the significance of a certiorari request in a more meaningful fashion.

Appellant submits that it is no fair answer to state simply that the rehearing and certiorari entitlements can be exercised regardless of whether an order or an opinion is issued. For the fact is that a petitioner seeking further appellate review must meet a far greater standard of persuasion than that which applies to the initial review proceedings. And regardless of the actual merit of a petitioner's claim, or the actual existence of an infirmity in the bases for the appellate decision being challenged, the ability to satisfy that burden is significantly diminished when arguments must be predicated on guesses as to the bases for the decision. 9/

9/ While appellant is also cognizant of this court's Rule 13(c), it is submitted that an order affirmance is not "appropriate" in this case, where the basis for some of appellant's contentions of error have not been dealt with by the District Court and the government has not responded by brief to appellant's contentions of error.

At the same time, while appellant is entitled to the assistance of counsel on appeal, Douglas v. California, 372 U.S. 353 (1963), an order affirmance here denies appellant the benefit of a truly informed judgment by appointed counsel as to the advisability or the manner of pursuing any of the remaining review entitlements -- a responsibility with which appointed counsel is specifically charged.[10/] For in the absence of some indication of the basis for the action taken here, counsel cannot effectively formulate, much less offer appellant, a meaningful "professional judgment" on the advisability of petitions for rehearing or for certiorari. Indeed, at this juncture counsel is in the position of being unable to even explain to the appellant on precisely what grounds the court affirmed his conviction.

10/See, e.g., "Checklist For Counsel Appointed By The Court Of Appeals To Represent An Indigent Appellant" dated October 20, 1969, pp. 6-7:

> If the decision is against your client, you should consider whether a petition for rehearing, either before the division of the Court that decided the case or before the Court en banc should be filed. If in your judgment the case warrants a petition for rehearing or a petition for certiorari in the Supreme Court, your obligation to your client includes the preparation and filing of an appropriate petition.

See also the letter from the Clerk of this Court to appellant and appointed counsel (in this case, dated September 25, 1969), transmitting the court's judgment:

> . . .appointed counsel are authorized under their appointment to take such further steps in the case as are dictated by their own professional judgment; that if their client requests them to file a petition for rehearing or suggestion for rehearing en banc and if in their professional judgment counsel are of the view that these pleadings should not be filed they should advise their client of that decision, and should do so before the time for applying for rehearing expires. . .
>
> . . .Having in mind the considerations governing review on certiorari, if in counsel's professional judgment the case warrants the filing of a petition for writ of certiorari, he shall, upon appellant's request, continue to repesent the appellant by preparing and filing a petition for writ of certiorari.

The effect on the exercise of counsel's "professional judgment" of an order affirmance here in lieu of a statement of reasons is neither figmentary nor theoretical. For example, as noted above, appellant had argued in his Brief, inter alia, that the circumstances attending his on-the-scene identification were unduly suggestive and affirmatively conducive to misidentification, in violation of the due process protections outlined in Stovall and subsequent cases. The court might have determined either (a) that the circumstances were not unduly suggestive, or (b) that the circumstances were suggestive but that the admission of the identification testimony was harmless error. Counsel's "professional judgment" on the adviseability of seeking rehearing or certiorari on that point would in fact differ, depending upon which of those two alternatives the division based its result. The same analogy can be applied to certain other contentions of error which appellant has advanced. With an order affirmance, however, counsel is left only speculation as to the basis for the division's affirmance -- hardly an adequate basis for a truly meaningful exercise of the "professional judgment" to which appellant is entitled.

In light of the foregoing, therefore, a rehearing by the division of the court which decided this appeal is requested. Alternatively, rehearing by the court sitting en banc is urged. In any event, a statement of reasons for the court's actions in affirming appellant's conviction is also requested.

Respectfully submitted,

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October 8, 1969

CERTIFICATE OF SERVICE

I, Edward P. Taptich, hereby certify that copies of the foregoing "Petition for Rehearing and Suggestion for Rehearing En Banc" have been served, personally, at the offices of the United States Attorney, U. S. Courthouse, Washington, D. C., this 8th day of October, 1969.

/s/ Edward P. Taptich
Edward P. Taptich